No. 274.

In the Supreme Court of the United States

OCTOBER TERM, 1925.

GENERAL INVESTMENT COMPANY,
Appellant,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Appellee.

BRIEF OF APPELLEE.

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STATEMENT.

This appeal presents a question of jurisdiction only. The bill avers that prior to December, 1914, The New York Central & Hudson River Railroad Company owned about ninety per cent. of the capital stocks of the Michigan Central and Lake Shore & Michigan Southern Railroads; that the Lake Shore owned a controlling interest in the stocks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (Big Four) and the Toledo & Ohio Central Railroad; and the Big Four a like interest in the stock of the Cincinnati Northern Railroad (R. 3, 4). That on December 22, 1914, the New York Central & Hudson River and the Lake Shore, with nine smaller railroads (not including either of the above mentioned other lines), were duly consolidated into The New York Central Railroad Company, defendant herein, the appellant at all times objecting and protesting (R. 2).

It is averred that by virtue of the consolidation, the appellee, the consolidated corporation, on December 22,

1914, acquired, has ever since held and now holds said stocks of the Michigan Central, Big Four and Toledo & Ohio Central, and also controls the majority of the stock of the Cincinnati Northern, through its ownership of the stock of the Big Four. And that it is thus enabled to and does dominate and control the business and property of these railroads (R. 5). Setting out at great length the location of the roads operated by the appellee and the other companies (R. 6-10), the bill avers that the New York Central, Michigan Central and Big Four lines are to a large extent parallel and naturally competing for both interstate and intrastate commerce, as are certain of those belonging to the Big Four and Toledo & Ohio Central (R. 10, 11). It charges that appellee's acquisition on December 22, 1914, and its subsequent holding of the controlling interest in these stocks, with the exercise of the control of said roads resulting therefrom, were and are in violation of the Sherman Act and Clayton Act, as well as of the constitutions and statutes of various states (R. 6, 11-13), and that if this situation is permitted to continue, appellee will be liable to the penalties of such laws and to have its charter forfeited, to the irreparable damage of the appellant and other of its stockholders (R. 14). The appellant then (R. 15, 16) pleads the commencement by it in December, 1914, of a suit to enjoin the consolidation (which, however, was consummated pending such litigation), and the dismissal of that suit; and that whereas the circuit court of appeals ordered it to be dismissed without prejudice in so far as it was based on asserted violations of state laws, this Court ordered its dismissal without prejudice as to those portions charging infractions of federal laws also; from which the remarkable theory is deduced that this suit is "brought pursuant to the leave so especially granted, *sua sponte*, by the Supreme Court of the United States."

The prayer is that such acquisition of the stocks of the Michigan Central, Big Four, and Toledo & Ohio Central, and the resulting control of these lines and of the Cincinnati Northern by the appellee, be held *ultra vires* and void; that appellee be enjoined from continuing such control or voting said stocks, and that it be required to sell and dispose of the same to those who will manage and operate said railroads free from the domination and control of appellee or any of its allied interests (R. 16, 17).

The appellee moved in the district court to dismiss for want of jurisdiction and on other grounds (R. 19, 20), and the motion was sustained, the court certifying that the dismissal was because it was without jurisdiction as a federal court (R. 23, 24).

ARGUMENT.

In *General Investment Co. vs. L. S. & M. S. Ry. Co. et al.*, 260 U. S. 261, which was concluded in November, 1922, plaintiff attempted by injunction to prevent the consolidation of the New York Central & Hudson River Railroad, extending from New York to Buffalo, with the Lake Shore & Michigan Southern Railway, reaching from Buffalo to Chicago, and nine smaller companies, into The New York Central Railroad Company, the present defendant. Neither the Michigan Central, Big Four, Toledo & Ohio Central, nor the Cincinnati Northern, were included in the consolidation. The New York Central & Hudson River which owned the majority of the stock of the Lake Shore, also owned a majority of the Michigan Central stock, and the Lake Shore owned a majority of the stock of the Toledo & Ohio Central and Big Four, which latter in turn owned a controlling interest in the Cincinnati Northern. When the consolidation took place these stocks became the property of the consolidated company, and the control of said com-

panies, which had formerly been exercised either by the New York Central & Hudson River or by the Lake Shore, passed to it with the stocks.

The bill in the present case does not attempt to overturn the consolidation. It treats it as accomplished, and as the effective means by which the appellee acquired the stocks of and thereafter the control over the Michigan Central, Toledo & Ohio Central and Big Four, and through the latter of the Cincinnati Northern. And it is this acquisition, on December 22, 1914, with the subsequent holding of said stocks by appellee and the exercise of control by means thereof, which is the sole basis of complaint. By this means it is alleged, competition has been suppressed and trade restrained.

According to the bill (R. 15, 16) the plaintiff's former suit was dismissed for want of jurisdiction, and this court ordered such dismissal to be without prejudice as to the entire bill. On p. 2 of appellant's brief it is stated:

> "The fact that the suit was brought in a state court was the sole ground of dismissal."

Much is made of this dismissal "without prejudice." It is said to amount to a refusal by this court to hold in the former case, as the district court held in this, that a private suit does not lie for injunctive relief against a common carrier in respect of its illegal acquisition of the stock of another carrier in violation of Sec. 7 of the Clayton Act. And the bill alleges that it constituted leave granted by the court to commence this suit. Both contentions are wrong. As said by Field, J., in *Durant vs. Essex Co.*, 7 Wall., 107, "without prejudice" in a decree of dismissal merely indicates that the merits have not been considered, and that the party may take further legal proceedings on the subject. If the dismissal be of a suit commenced with-

out right in a state court, "without prejudice" is no assurance that it will be entertained when commenced in a federal court; or that a second suit will lie in any court. Especially when as here the second case differs materially from the one dismissed. That the qualification is proper in dismissals for want of jurisdiction see *Gaylord vs Kelshaw*, 1 Wall. 81, and *Hartell vs. Tilghman*, 99 U. S. 547.

THIS PRIVATE SUIT IN SO FAR AS IT IS BASED ON VIOLATIONS OF THE SHERMAN ANTI-TRUST ACT OR CLAYTON ACT CAN NOT BE MAINTAINED.

In *General Investment Co. vs. The L. S. & M. S. Ry. Co. et al., supra*, it is said in the opinion:

> "As respects the Sherman Anti-trust Act as it stood before it was supplemented by the Clayton Act, this court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive, and that those remedies consisted only of (a) suits for injunctions brought by the United States in the public interest under Sec. 4, and (b) private actions to recover damages, brought under Sec. 7. (Citing cases.) The present suit for an injunction, brought by a private corporation in its own interest, was not within those remedies, and so could not be maintained under that act, standing alone.
>
> "That act was supplemented by the Clayton Act, particularly by its 16th section, reading as follows:
>
> " 'That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Anti-trust Laws, including sections two, three, seven, and eight of this act, when and under the same conditions and principles as injunctive relief against threatened con-

panies, which had formerly been exercised either by the New York Central & Hudson River or by the Lake Shore, passed to it with the stocks.

The bill in the present case does not attempt to overturn the consolidation. It treats it as accomplished, and as the effective means by which the appellee acquired the stocks of and thereafter the control over the Michigan Central, Toledo & Ohio Central and Big Four, and through the latter of the Cincinnati Northern. And it is this acquisition, on December 22, 1914, with the subsequent holding of said stocks by appellee and the exercise of control by means thereof, which is the sole basis of complaint. By this means it is alleged, competition has been suppressed and trade restrained.

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duct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to Regulate Commerce, approved February fourth, eighteen hundred and eighty-seven, * * * in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.'

"This section undoubtedly enlarges the remedies provided in the Sherman Anti-trust Act to the extent of enabling persons and corporations threatened with loss or damage through violations of that act to maintain suits to enjoin such violations, save in the instances specified in the proviso."

As the defendant is a common carrier subject to the Act to Regulate Commerce and this is a private suit in equity for injunctive relief, the court below had no jurisdiction if the suit is "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." It is perfectly clear that it is.

Section 7 of the Clayton Act (38 Stat. L. 731) provides:

"Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any sec-

tion or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

* * *

The bill charges the defendant with very specific and definite violations of these provisions. After setting out one of the terms of the consolidation agreement, it avers (R. 5):

"By virtue of said agreement and pursuant thereto, the defendant, New York Central Railroad Company, acquired, on December 22nd, 1914, has ever since held and now holds the $30,207,700 of the capital stock of the Big Four Company, $9,547,700 of the capital stock of the Ohio Central Company, and which, prior to said date, had been held by said Lake Shore Company, and also, through its control of the Big Four Company, controls $1,707,400 of the capital stock of the Cincinnati Northern Company, and said defendant, on said date, also acquired, pursuant to said agreement, has ever since held and now holds, the $16,819,300 of the capital stock of the Michigan Central Company, which, prior to December 22nd, 1914, had been held by the New York Central & Hudson River Railroad Company."

Charging that "by reason of such ownership of a majority of the capital stocks of the several companies," the defendant dominates and for nearly ten years has dominated and controlled their affairs, the bill proceeds (R. 6):

"The acquisition by the New York Central Railroad Company, in December, 1914, and its continued holding of the controlling interest in the capital stock of the Big Four Company, to-wit: $30,207,700 of the common capital stock, and the acquisition by the said New York Central Company, in December, 1914, of $16,819,300, the same being about 90 per cent of the outstanding capital stock of the Michigan Central Railroad Company, and the continued holding thereof, and the acquisition by said defendant, New York Central Company, in December, 1914, of $9,547,700—a controlling interest—of the capital stock of the Toledo and Ohio Central Railway Company and the continued holding thereof and the continued exercise of control and domination of said Big Four Company, the Michigan Central Company and the Ohio Central Company were and are in violation of the Federal Anti-Trust Acts, commonly known and referred to as the Sherman Act and the Clayton Act; and the same also were and are in violation of the constitutions and statutes of the States of Pennsylvania, Ohio, Illinois, Indiana and Michigan."

It further alleges that the lines of the defendant, the Michigan Central, the Big Four and the Toledo & Ohio Central are to a large extent parallel and naturally competing for both interstate and intrastate commerce, and that the acquisition by the defendant of the controlling interest in the capital stocks which is complained of suppresses such competition, renders its charter subject to forfeiture and subjects it to the penalties of the Sherman Act and Clayton Act, etc.

The foregoing averments, with others not necessary to refer to, certainly set up a claimed violation of section 7 of the Clayton Act, and present a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission.

For it is provided by section 11 of that act:

"Sec. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be,

in the manner and within the time fixed by said order."

The section further provides that the commission may apply to the circuit court of appeals for the enforcement of its order, and for the proceedings to be taken upon such application; that the judgment and decree of the court shall be final, but subject to review by this Court upon certiorari; and that the party against whom the order is made by the commission may have it reviewed in the circuit court of appeals, whose jurisdiction to enforce, set aside or modify such orders shall be exclusive.

The bill is framed on the theory that the consolidated corporation was capable at its inception of violating the Act, and that its acquisition of the stocks with the resulting control of the Michigan Central, Big Four and Toledo & Ohio Central did violate it. No claim is or can be made, as was done in *Aluminum Company of America vs. Federal Trade Commission*, 284 Fed. 401, that because of the fact that when the stocks were acquired one of the parties to the transaction was not engaged in commerce, the provisions of section 7 could not apply. In the dissenting opinion that view was followed, but the contrary decision of the majority met the approval of this Court, which denied a petition for certiorari, 261 U. S. 616. The bill also charges the violation of the second clause of section 7, alleging a lessening of competition between the companies whose stocks were acquired; and in such a case the offending corporation is not required to be engaged in commerce. Nor does appellant contend that defendant's acquisition of the stocks through the consolidation is not such acquisition, direct or indirect, as is mentioned in the first clause of the section.

On the appellant's averments section 7 of the Clayton Act was violated and therefore, as to this private

litigant, the Interstate Commerce Commission had sole original jurisdiction of the matter, and the only power of the courts is revisory or in aid of orders of that tribunal.

For a case analogous in some respects see *U. S. vs. Southern Pacific,* 290 Fed. 443. This Court held in *U. S. vs. Southern Pacific Co., et al.,* 259 U. S. 214, that the acquisition of the control of the Central Pacific by the Southern Pacific was illegal under the Sherman Act. Thereafter the Interstate Commerce Commission, acting under section 5, par. (2) of the Act to Regulate Commerce as amended by Transportation Act 1920, authorized such control, and in the above cited case its action was approved. It is a striking example of the exercise by the Commission of the sort of jurisdiction mentioned in the proviso of section 16.

THE FEDERAL REMEDY PROVIDED BY THE CLAYTON ACT IS EXCLUSIVE, AND THE DISTRICT COURT WAS WITHOUT JURISDICTION OF ALLEGED VIOLATIONS OF STATE CONSTITUTIONS AND LAWS.

Section 1 of the Clayton Act defines the term "commerce," as used in the Act to mean trade or commerce among the several states and with foreign nations, etc., not including commerce wholly within a single state. And it is the suppression of such commerce with which section 7 of the Act deals. The authority of the commission under section 11 to enforce compliance with section 7 by an order requiring one carrier to divest itself of the stock of another is limited, so far as express language is concerned, to cases involving commerce as so defined. Nevertheless the subject is of such a nature that where it appears that the acquisition of the stock and resulting control of one interstate carrier by another not only violates the Federal Anti-trust Acts by lessening competition in

interstate commerce, but also transgresses state constitutions and laws designed to protect intrastate commerce; the federal remedy is and must be exclusive.

The state laws and constitutions which are pleaded in the bill forbid the same things denounced by the federal laws; that is, combinations in restraint of trade, suppression of competition through control of parallel and competing lines, and monopolization of traffic. And the remedy invoked by the appellant for the violation of such state laws is precisely the remedy provided by section 11 of the Clayton Act, to-wit, the enforced disposition by the appellee of its Michigan Central, Big Four and Toledo & Ohio Central stocks. Whether such relief be secured by order of the commission or by decree of a court, and whether to protect interstate or intrastate commerce, once granted it will be effective as to both classes of commerce, and put an end to violations of federal as well as state laws. If The New York Central Railroad Company disposes of the stocks about which complaint is made and surrenders control of these companies, it will do so for every purpose. Neither a decree of a court nor an order of the commission under section 11 of the Clayton Act can be limited in its effect to the vindication of state laws alone, or of federal laws alone. The situation is very different from that in *State of Texas vs. Eastern Texas R. Co.*, 258 U. S. 204, where, dealing with the abandonment of a railroad entirely within the state, used only by a corporation of that state, and not a part of any other line, and whose local operation would neither burden nor affect interstate commerce, this Court held that the power of the Interstate Commerce Commission to authorize abandonment of railroads conferred by Transportation Act 1920 did not include the power to authorize the discontinuance of the intrastate operations of that par-

ticular road. Under the peculiar facts of that case, abandonment of interstate operations could be entirely separated from abandonment of intrastate operations. In the case at bar the bill avers that the acquisition of the stocks and of the control complained of had precisely the same effect upon intrastate commerce and interstate commerce, in that it lessened competition in both. And it is apparent that there can be no separation of the result of the disposition by the defendant of such stocks and control as between the two classes of commerce; both will necessarily be affected in the same manner and to the same degree. So that an order issued by the commission under section 11 of the Clayton Act requiring such disposition to protect interstate traffic must necessarily, though incidentally, affect intrastate traffic as well.

In such a case where Congress has entered the field by legislating against a wrong and prescribing a remedy, such remedy is exclusive of all others, and such legislation supersedes the provisions of state constitutions or laws so far as is necessary to make the federal law effective.

Houston East and West R. R. Co. vs. United States, 234 U. S. 342;

Interstate Commerce Commission vs. Goodrich Tire Co., 224 U. S. 194;

Southern R. R. Co. vs. R. R. Com., of Indiana, 236 U. S. 439;

Railroad Co. vs. Rigsby, 241 U. S. 233;

Railroad Com. of Wisconsin vs. C. B. & Q. R. R. Co., 257 U. S. 563;

New York vs. U. S., 257 U. S. 591.

If this be not true, then it is possible in practically every case involving control of one carrier by another

to thwart the will of Congress and deprive the Interstate Commerce Commission of its jurisdiction under the Clayton Act by joining with a charge of the violation of federal laws, a claim of infraction of like state laws, as is done in this bill. A case can be conceived where one carrier secures the control of another for the sole purpose and with the sole effect of lessening competition in intrastate traffic only, and where state laws only would apply; but this is not such a case.

The fact that in the former case, 260 U. S. 261, this Court considered the sufficiency of that part of the bill which charged violations of state laws, and thus in a way exercised jurisdiction, is of no consequence. For it is to be remembered that that case was brought to enjoin the proposed consolidation (see appellant's statement of the purpose of its former suit, R. 15), and when it was filed in 1914 the Interstate Commerce Commission had not been given jurisdiction over consolidations of railroads, which has since been conferred upon it. There was no federal remedy and of course no exclusive remedy to be administered by the commission for the prevention of improper consolidations. While the federal remedy under section 11 of the Clayton Act which we now invoke was then available, the case which the appellant made did not call for its application. Appellant was then complaining of a threatened future consolidation and not of the completed violation of section 7 by an acquisition of stocks which had already taken place.

As to such executed transaction affecting both interstate and intrastate commerce, the federal law necessarily supersedes state laws and constitutions, the federal remedy is exclusive, and a private suit charging such transaction to be a violation of state law does not lie, even in a court of the United States.

Cases such as *Brushaber vs. Union Pacific R. R. Co.*, 240 U. S. 1, and *Stanton vs. Baltic Mining Co.*, 240 U. S. 103, cited in appellant's brief have no application. It was there held that a suit by a stockholder to restrain his corporation from paying an unconstitutional tax did not violate the prohibitions of Sec. 3224 R. S. against enjoining the enforcement of taxes. And that such a stockholder's suit was not a proceeding to prevent the government from assessing and collecting the tax, which was the sort of proceeding prohibited by Sec. 3224. The appellant bases its right to sue in the instant case on the provisions of section 16 of the Clayton Act, and can not claim that the suit is not one contemplated by that section. As a matter of fact, it comes strictly within the section, being a suit for injunctive relief against threatened loss by violation of the anti-trust laws, including section 7 of the Act. But if it is not such a case, then it is filed without any pretense of authority, for it is only under this section that such private suits will in some instances lie. *General Investment Co. vs. L. S. & M. S. Ry. Co., supra.*

That the district court was without jurisdiction of any feature of the case made by the bill, and that its judgment should be affirmed, is

Respectfully submitted,

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